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In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL VETERAN SMALL BUSINESS COALITION ET AL. IN SUPPORT OF PETITIONER

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The National Veteran Small Business Coalition, the National Association for Black Veterans, the National Veteran Business Development Coalition, the National Veteran-Owned Business Association, the Task Force for Veterans' Entrepreneurship, Women Veterans Business Solutions LLC, Crosstown Courier Service, Inc., Aldevra LLC, Division Construction Inc., Spartan Medical Inc., AeroSage LLC, BlackBox Migrations LLC, VetLikeMe, VanDahl Engineering & Sales, SMART, POTHOS, Inc., Shelby Distributions, and Applied Fab and Machining submit this brief in support of Kingdomware Technologies, Inc.

INTEREST OF AMICI CURIAE[1]

Amici are several national veterans organizations representing thousands of veteran-owned businesses and individual veteran entrepreneurs. Amici also include individual veteran-owned small businesses and service-disabled veteran owned businesses.

Amici share the common aim of protecting the statutory rights of veterans and veteran-owned businesses.

The National Veteran Small Business Coalition ("NVSBC") was formed in 2010 to help level the playing field for veteran-owned and service-disabled vet-

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that both parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

eran-owned small businesses in federal contracting. On behalf of more than 200 members, the NVSBC promotes enhanced opportunities for veteran-owned small businesses to participate in federal contracting and subcontracting.

The National Association for Black Veterans ("NABVETS") is an organization certified by the Department of Veterans Affairs ("VA") to represent veterans before the Board of Veterans' Appeals and to provide assistance to veterans filing claims for their benefits. Representing nearly 50,000 members, NABVETS was formed in the early 1970s to provide support for the unmet needs of African-American veterans returning from the war in Vietnam. NABVETS in the years since has provided a variety of services to veterans of all wars and regardless of race, while maintaining as a priority the concerns of African-American and minority veterans.

The National Veteran-Owned Business Association ("NaVOBA") is a national organization representing more than 53,000 businesses and individuals. NaVOBA supports veteran-owned businesses by, among others, encouraging corporations, government departments, and the public to purchase products and services from veteran-owned businesses.

The Task Force for Veterans' Entrepreneurship ("Vet-Force") is composed of over 200 organizations and affiliates representing thousands of veterans throughout the United States, many of which own small businesses. Vet-Force advocates for veteran entrepreneurs, monitors the implementation of veterans' programs, and promotes small business opportunities for veterans.

The National Veteran Business Development Council ("NVBDC") is the Nation's leading third-party authority for certification of veteran-owned businesses of all sizes and the corporations that seek to engage them. Through its review and certification process, NVBDC helps veteran-owned and service-disabled veteran-owned businesses become eligible for business opportunities with the United States and with private companies.

Strengthening The Mid-Atlantic Region For Tomorrow ("SMART") is a 501(c)(3) organization founded by a U.S. Army veteran that promotes science and technology initiatives in the Mid-Atlantic region, and which maintains as a priority supporting veteran entrepreneurs and their businesses.

Crosstown Courier Service, Inc. ("Crosstown") is a service-disabled veteran-owned small business that also employs other veterans. Established in 1998, Crosstown provides delivery, logistics, and warehousing services to the VA and other clients nationwide. Prior to an abrupt reduction in contracting opportunities with the VA, Crosstown provided time-sensitive transportation of diagnostic specimens to laboratories, among other services to the VA. Crosstown protested before the Government Accountability Office ("GAO") the VA's compliance with the statute at issue in this case, and the GAO sustained Crosstown's protest in 2012. The VA declined to implement the GAO's recommendation.

Aldevra LLC is a service-disabled veteran-owned food service and medical equipment provider specializing in federal government procurement. Established in 2009 and based in Michigan, Aldevra has

successfully performed as the prime contractor on several federal and state government contracts. The VA's failure to comply with the Act caused Aldevra to lose substantial opportunities and led to several bid protests. *See Aldevra*, B-405271, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011); *Aldevra*, B-406205, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012). In these cases, the GAO agreed with Aldevra, rejecting the same VA arguments presented in this case. The VA declined to follow the GAO.

Division Construction Inc. ("DCI") was incorporated in 2013 by a former United States Navy air traffic controller. DCI provides quality construction services with a focus on electrical and control contracts primarily for the VA in the New York City metropolitan area. DCI also provides construction management services, general contractor services, and supply services. Since its founding, DCI has allowed its owner and employees the opportunity and privilege to continue serving the United States by providing quality and timely construction services at VA medical facilities.

Spartan Medical Inc. was founded in 2008 by a former Air Force intelligence officer in an effort to provide an extensive array of advanced medical devices and technologies focused on the needs of the VA and Department of Defense. A service-disabled veteran-owned small business, Spartan Medical collaborates with ethical manufacturing partners to provide innovative, state-of-the-art medical devices and technologies that meet the ongoing challenges of surgical and clinical care.

Women Veterans Business Solutions LLC ("WVBS") is a small market research and public opinion polling organization that has operated in Philadelphia, Pennsylvania since 2006. A service-disabled veteran-owned small business, WVBS facilitates networking among women veterans for business and employment purposes. WVBS also performs market analysis and research with respect to economic issues faced by women veterans, including women veterans who consider contracting with the VA.

AeroSage LLC is a Florida-based service-disabled veteran-owned small business that provides professional services both to government organizations as well as businesses seeking to contract with the government. AeroSage's clients include government agencies and departments, prime government contractors, small businesses, and emerging high-technology companies.

Shelby Distributions Inc. (d/b/a Express Office Products) is a service-disabled veteran-owned business that provides, stores, delivers, and installs office furniture and office supplies. Based in El Paso, Texas, Shelby Distributions has served the private sector and the government for 15 years, and is also certified as a woman-owned small business and minority-owned small business.

BlackBox Migrations LLC ("BlackBox") is a service-disabled veteran-owned small business that offers project management and database management solutions to both private industry and the government. Based in Texas and Washington, D.C., BlackBox aims to provide services and staffing to the fed-

eral government with all the discipline and commitment of its founder's past service.

VanDahl Engineering & Sales Ltd. of Scottsdale, Arizona ("VanDahl"), is a veteran-owned engineering and construction firm established in 1986. VanDahl provides building renovations and repairs, electronic security and surveillance systems, finishing installations, masonry, road work, and preventive maintenance for patient lift systems and hospital beds.

POTHOS, Inc., is a service-disabled veteran-owned small business that provides logistics, meeting management, and staffing for private and government clients. Based in California, POTHOS also serves other service-disabled business organizations such as the California Disabled Veteran Business Alliance and the National Veteran-Owned Business Association.

VetLikeMe is a news publication owned and operated by service-disabled veterans. Established in 2010 by a disabled veteran with thirty years of experience in government public relations, VetLikeMe reports on issues relevant to service-disabled veteran-owned businesses. VetLikeMe also advocates for expanded opportunities for veteran-owned businesses to compete in federal contracting.

Applied Fab and Machining is a contract manufacturer of high-precision machined and fabricated parts for the defense and commercial industries. Applied Fab and Machining is a service-disabled veteran-owned business whose CEO is a West Point graduate and combat veteran.

* * *

The Federal Circuit's opinion interpreting the Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 (the "2006 Act") affects not only Kingdomware Technologies, Inc., but 2.5 million veteran-owned small businesses and 200,000 service-disabled veteran-owned businesses throughout the United States,[2] including the amici identified above. The Federal Circuit's opinion severely undermines the ability of veteran-owned small businesses to transact with the VA, contrary to federal law and Congress's express purposes.

SUMMARY OF ARGUMENT

No statute could repay the debt our Nation owes its veterans. But veterans are entitled to expect that the terms of the statutes that are enacted—here, a nine-year-old statute with a mandatory provision providing a targeted opportunity to bid on contracts with the VA—are interpreted correctly, and in accordance with Congress's express directions and purposes. The Federal Circuit failed to live up to that basic expectation.

This is not a case where "strong" arguments in favor of a statute's plain meaning spar with arguments in favor of preserving the workability of the statute in light of its "context and structure." *King v.*

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[2] Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, 1 (Mar. 2012), http://www.sba.gov/sites/default/files/393tot.pdf; Small Business Administration, *Veteran Owned Small Business Contracting Programs* (June 2013), https://www.sba.gov/sites/default/files/SDVOSB_workbook_0.pdf.

Burwell, 135 S. Ct. 2480, 2495 (2015). Plain meaning and workability are both aligned on the side of Kingdomware.

Nor is this a case where the Court is faced with a catchall phrase and the parties debate whether it should be read broadly or narrowly in light of surrounding language and the statute's core purposes. *Yates v. United States*, 135 S. Ct. 1074 (2015). The term at issue in this case directly targets the core objective Congress identified: expanding competitive bidding opportunities through a mandatory mechanism. By denying the plain meaning of Congress's words and substituting a judicially created "harmonious" result, Pet. App. 20a, the Federal Circuit rendered the 2006 Act a shell of what it its words intended it to be.

The effect of the Federal Circuit's misreading is grave. By reading out the mandatory mechanism of the statute in favor of a non-binding, prefatory statement, the Federal Circuit significantly weakened the statutorily protected opportunity of veteran-owned small businesses ("VOSBs") and service-disabled veteran-owned small businesses ("SDVOSBs") to do business with the VA.

Despite the fact that the Federal Supply Schedule is nowhere exempted from the scope of the 2006 Act by the Act's terms, or even mentioned in the Act, the Federal Circuit's decision gives new, unwarranted importance to whether a business is included on the Schedule. Pet. App. 12a. Data from 2007 indicate that an estimated 60% of the VA's purchases may be conducted through the Schedule—and therefore out-

side competitive bidding—in a given year.[3] The practical effect of the Federal Circuit's decision is that roughly $10 billion of the VA's $18 billion in annual purchases may be exempt from competitive bidding by VOSBs and SDVOSBs. As such, the 2.5 million VOSBs and 200,000 SDVOSBs that might seek to do business with the VA will now have drastically reduced opportunities to compete.

By avoiding what Congress actually wrote, and by prizing a Schedule about which Congress said nothing at all, the Federal Circuit distorted the 2006 Act and removed a crucial stepping-stone for veteran-owned businesses to succeed in the private market. Barry L. McVay, *Getting Started in Federal Contracting*, 183 (5th ed., 2009) ("One of the most direct ways the government can encourage and nurture small businesses is through federal contracts.").

Nor will the Federal Circuit's decision avoid the harm it believes would flow from the interpretation urged by the GAO, Kingdomware, the amici, and Judge Reyna's dissenting opinion. The Federal Circuit eliminated the effect of the word "shall" in 38 U.S.C. § 8127(d) out of concern that it would restrict the VA and burden the contracting officer. Pet. App. 19a-20a. But in rewriting the word "shall" and tethering the VA contracting officers to calculations of the VA's daily progress towards its annual goals, the Federal Circuit's decision causes the harm it purports to avoid.

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[3] Pet. 35; *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). The Federal Circuit cited a newspaper article for the proposition that in 2011 the VA used the Federal Supply Schedule for 20% of its total spending. Pet. App. 4a.

Under the Federal Circuit's interpretation, each VA contracting officer must now hesitate before executing a procurement decision and attempt to ascertain the VA's progress towards its annual contracting goals. In addition to creating immediate uncertainty for veterans, the Federal Circuit nowhere explains how a VA contracting officer might accomplish this unusual obligation (which finds no home in the 2006 Act or its implementing regulations).[4] In attempting to avoid an imaginary harm (placing the VA contracting officer in a straitjacket), the Federal Circuit caused a genuine and severe one—a cumbersome progress determination before every purchase—that both burdens the contracting officer and harms VOSBs and SDVOSBs. That is the opposite of what Congress intended in enacting the 2006 Act.

The Court should reverse the Federal Circuit's decision and restore Congress's express statutory mechanism for enhancing competitive bidding by veteran-owned small businesses.

ARGUMENT

I. The Federal Circuit's Decision Dismantles the 2006 Act's Targeted Means of Helping Veterans Build Businesses

The Federal Circuit's misreading of the 2006 Act neutralizes the Act's targeted means of helping veterans build their businesses after completing years of service to the Nation.

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[4] Pet. App. 20a. "[T]here is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a (Reyna, J., dissenting).

Section 8127(d)'s mandate that "restricted competition"—in the form of competitive bidding between eligible VOSBs and SDVOSBs—"shall" apply came against the backdrop of persistent, government-wide obstacles to increasing contracting with VOSBs and SDVOSBs. Congress enacted the 2006 Act and its provision targeted to the VA because prior attempts to bolster VOSB and SDVOSB contracting had fallen unacceptably short. Pet. App. 5a. Companies may declare a willingness to hire veterans or do business with VOSBs and SDVOSBs,[5] but, in practice, Congress determined that pledges and government encouragement were not enough. Likewise, Congress recognized that attempts to enhance the awareness of government contracting officers and leverage their discretion had not succeeded. Pet. Br. 11-13; H.R. Rep. No. 109-592, at 15 (2006).

Section 8127(d) does not apply to all government purchasing, only that by the VA. Pet. App. 5a. Given its historical mandate, the VA was a fitting department to take on additional responsibility for promoting veteran-owned business contracting.[6]

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[5] Though many companies profess that they would be happy to hire a veteran or engage with a business owned by a veteran, in practice veterans face obstacles that non-veterans simply do not. *See* Executive Office of the President, Council of Economic Advisers and the National Economic Council, *Military Skills for America's Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work*, 4-7 (May 31, 2012), http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf ("Labor Market Challenges for Military Families").

[6] The VA itself embraces this mandate. "This procurement authority, and its subsequent implementation, is a logical exten-

Changing course from prior legislative attempts, the 2006 Act moved from a hortatory model to one that requires specific action by one department.

The Federal Circuit's recasting of the meaning of the word "shall" in § 8127(d) misses the key change that the 2006 Act directed, and eliminates a crucial stepping-stone for veteran businesses. The 2006 Act's mandatory restricted competition provision was no accident; it was designed to use the VA as a targeted incubator for veteran contracting. Pet. App. 5a (Congress enacted "a statute specifically and only directed to the VA."). Founders, owners, and officers of VOSBs and SDVOSBs – such as those of the amici businesses – obtained valuable experience and special skills through their years of service. It should be no surprise that when veterans start small businesses, they draw on the skills honed as well as the experiences gathered from their years of service to build companies that seek to enhance the lives of their fellow veterans and the services provided at the VA, whether through new medical technology, advanced equipment, or other innovative products and services.

The Federal Circuit's decision dismantles the statutory mechanism for VOSBs and SDVOSBs to compete for contracts with the VA, and to use such competitive opportunities to make inroads in the private sector. A veteran's small business not only benefits directly from competitive bidding when that

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sion of VA's mission, to care for our nation's Veterans." Office of Small & Disadvantaged Business Utilization, *Vets First Verification Program*, http://www.va.gov/osdbu/verification/index.asp (last visited Aug. 24, 2015).

mechanism leads to a contract, but indirectly when competitive bidding opens doors to private-sector opportunities. The opportunities afforded by competitive bidding build competency and market presence for VOSBs and SDVOSBs, the benefits of which extend well beyond any one government contract. *See* McVay, *supra*, at 183.

In recognition of the unique sacrifices veterans make, and the unique challenges veterans face upon returning from duty, Congress established not a subsidy, grant, or government-wide guarantee, but simply a mechanism for competitive bidding before one government department uniquely positioned to serve veterans. Interpreting the 2006 Act such that it is no longer mandatory in practice, and instead is only mandatory until certain goals are met (if at all), deprives VOSBs and SDVOSBs of the targeted support Congress intended.

II. The Federal Circuit's Decision Distorts the Role of the Federal Supply Schedule to Exempt Billions of Dollars From Competitive Bidding By VOSBs and SDVOSBs

The Federal Circuit's ruling prizes the Federal Supply Schedule in a manner divorced from the actual text of the 2006 Act. The Schedule is nowhere mentioned in, or exempted from the scope of, the 2006 Act, yet the Federal Circuit makes the Schedule the keystone of its opinion. Pet. App. 3a-4a. In so doing, the Federal Circuit avoids the text of the 2006 Act in favor of Congressional silence. The Federal Circuit's immunizing of the Schedule and the contracting officer's corresponding discretion is contrary to the 2006 Act's mandatory mechanism.

The Federal Circuit's decision permits the VA to resort to the Federal Supply Schedule without first allowing SDVOSBs and VOSBs an opportunity to offer competitive bids under § 8127(d)'s mandatory mechanism. Under the Federal Circuit's decision, a federal statute designed to promote thousands if not millions of veteran-owned businesses will now primarily enhance the fraction of VOSBs and SDVOSBs that are already on the Schedule (should they be chosen by the contracting officer resorting to it). In prioritizing the Federal Supply Schedule over the terms of the statute, the Federal Circuit exempts 60% of VA business from competitive bidding by qualified veterans, Pet. 35; *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009), and arrives at a result that is at odds with what Congress intended.

In order to be eligible for a Federal Supply Schedule contract, a business must have $150,000 in commercial sales or $25,000 in Government sales annually, and meet a variety of other criteria.[7] Publicly available data from the VA and GSA confirm that VOSBs and SDVOSBs are significantly outnumbered on the Federal Supply Schedule.[8] The VA Federal Supply Schedule Service manages nine multiple award schedule programs under three areas:

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[7] Office of Acquisition and Logistics, *Prospective Contractors*, http://www.va.gov/oal/business/fss/prospective.asp (last visited Aug. 24, 2015).

[8] The Federal Circuit cited a newspaper article for the proposition that "in 2011, the VA used Federal Supply Schedule contracts for 20% of its total spending, and 13% of these Federal Supply Schedule expenditures went to VOSBs." Pet. App. 4a (citation omitted). As noted by Kingdomware, the accuracy of such figures has since been called into question. Pet. Br. 57-58.

Pharmaceuticals, Commodities, and Services.[9] On six of the nine VA Schedules, VOSBs and SDVOSBs number fewer than 40 (out of hundreds), and on two there are no VOSBs or SDVOSBs at all.[10] Even where VOSBs and SDVOSBs are reasonably represented on the schedules, that inclusion is no guarantee of obtaining a contract. Indeed, veteran-owned businesses on the Schedule have none of the 2006 Act's protections, and remain subject to the "culture of indifference" among contracting officers. H.R. Rep. No. 109-592, at 15 (2006).

In concluding that "shall" in section 8127(d) did not mean "shall," the Federal Circuit was quite certain that its decision avoided surplusage *within* the 2006 Act, Pet. App. 19a, and quoted a 2010 Federal Circuit opinion for the "rule of statutory construction that Congress does not use unnecessary words." *Id.* (citation omitted). But aside from finding surplusage where none existed, the Federal Circuit's misreading

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[9] *See* Office of Acquisition and Logistics, *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last visited Aug. 15, 2015) (identifying the nine schedules by group number: 65 I B, 65 II A, 65 II C, 65 II F, 65 VII, 65 V A, 66 III, 621 I, 621 II).

[10] These unofficial figures are based on data retrieved on August 15, 2015 from the GSA's publicly available electronic library, which acts as the "one source for the latest GSA contract award information." GSA Federal Acquisition Service, *GSA eLibrary*, http://www.gsaelibrary.gsa.gov/ElibMain/home.do (last visited Aug. 15, 2015). The eLibrary identifies through downloadable Excel tables profile data on contractors presently included the nine VA Federal Supply Schedule schedules. *Id.* (data available for VA's nine schedules searchable by group number). The profile data for each contractor indicates whether the contractor is veteran-owned or service-disabled veteran-owned.

tacitly concluded that Congress had uttered a bevy of unnecessary surplusage in enacting the 2006 Act entirely. The Federal Circuit jettisoned the linguistic differences *between* the 2006 Act and the 2003 law it amended, and eliminated the core change the 2006 Act intended. That was error. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). The Federal Circuit ignored the new design and mandatory language of the 2006 Act, leaving in its wake the discretionary tools that had already proven inadequate.

The Federal Circuit's decision thus diverts billions of dollars from hundreds of thousands of potentially qualified competitors by taking bids out of the competitive contracting process and leaving them to the discretion of contracting officers and the Federal Supply Schedule. By adopting an approach that immunizes the contracting officers' reliance on the Schedule, the Federal Circuit excluded thousands of veteran-owned businesses from competition for billions of dollars of contracts.

In no small irony, the VA itself encourages businesses seeking to be placed on the Schedule to conduct market research before applying for inclusion on it. The VA counsels:

> It is recommended that you conduct market research to identify and assess your competition prior to submitting a proposal. Review current contractor pricing, terms, and conditions available on NAC Contract Catalog Search Tool, GSA eLibrary or GSA *Advantage*!.

> Your review of the competition should include: competitor's pricing, delivery times, warranty terms, services, and any other elements that make their offering distinct when compared to your own.[11]

The VA's recommendation that market research be conducted is well taken, and—under the correct reading of the 2006 Act—applies equally to the VA and its contracting officers.

The Federal Circuit's decision elevated the Federal Supply Schedule in a manner contrary to the terms and intent of the 2006 Act, and despite the fact that the Schedule is not mentioned in the 2006 Act. The Federal Circuit misconstrued Congressional silence as an intent to exclude 60% of all purchasing done by the VA from the Act's scope. The harm that this misreading exacts on veteran-owned businesses merits reversal.

III. The Federal Circuit's Decision Creates Significant Uncertainty for Thousands of Companies Doing Business With the VA

The Federal Circuit's decision creates significant uncertainty for those doing business with the VA because the treatment of each contract will depend on a moving target—the VA's progress to date—rather than a mandatory mechanism. Because the Federal Circuit's decision undermines the expectations of

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[11] Office of Acquisition and Logistics, *Prospective Contractors* http://www.va.gov/oal/business/fss/prospective.asp (emphasis in original) (last visited Aug. 24, 2015).

companies considering contracting with the VA, the Court should reverse the Federal Circuit and restore the expectations of VOSBs, SDVOSBs, and Congress, which all understand that "shall" means "shall."

Under the proper interpretation of the 2006 Act, and prior to using another procurement method, the VA must first assess whether it can make a purchase using restricted competition (i.e. whether at least two qualified SDVOSB or VOSB bidders exist that can submit offers that lead to an award at a fair and reasonable price and offering best value). 38 U.S.C. § 8127(d); 48 C.F.R. §§ 819.7005, 7006. But under the Federal Circuit's approach, the VA need not use restricted competition unless the VA in its discretion deems it necessary to meet its purchasing goals. Pet. App. 20a ("[T]he agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection [8127](a) are met.").[12]

By placing the mandatory clause in § 8127(d) at the mercy of a prefatory statement, the Federal Circuit's decision deprives both the VA and those businesses seeking to do business with the VA of certainty as to whether and how a given contract will be made available for bid. Depending on how the VA is doing in approaching its goals, a contracting officer may feel compelled to place a contract up for bid, or not. Pet. App. 30a-32a (Reyna, J., dissenting). The Federal Circuit's approach means that the VA itself cannot offer clarity or consistency as to what opportunities are available to VOSBs and SDVOSBs.

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[12] The Rule of Two is a "procedure well-known throughout the Government in connection with award of contracts set aside for competition restricted to small businesses." Pet. App. 5a.

The Federal Circuit's ruling also means that, contrary to Congress's express direction, a competitive bid process between VOSBs and SDVOSBs will not be ordered when eligibility and other criteria are met. Instead, the bid process will always depend on moving targets, rendering the likelihood of any bid award for veteran-owned businesses dependent on how many contracts have been awarded to that date (if the contracting officer is even able to obtain such information, which is doubtful).[13]

As noted by the dissent, each VA contracting officer must now hesitate before each procurement decision and attempt to ascertain the VA's progress towards its annual contracting goals, even though "there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a.

By allowing the goal-setting language to re-write the mandatory language of § 8127(d), the Federal Circuit assumed that each contracting officer will be able to conduct a daily determination as to the VA's progress towards its goals. Pet. App. 32a (Reyna, J., dissenting) (panel majority "saddle[s] contracting officers with the obligation in every acquisition to determine the status of the agency's small business goals—expressed as percentages of total awarded contract dollars—but does not elaborate on how contracting officers can determine that these goals have been 'met' before the end of the fiscal year"). That assumption has no facts to support it.

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[13] Pet. App. 27a (Reyna, J., dissenting).

The obligation to hesitate and conduct an analysis of the progress of the VA as a whole lacks any basis in the 2006 Act, and simply misunderstands how the VA makes purchases. The uncertain and ad hoc process fashioned by the Federal Circuit is foreign to the text and aims of the statute.

IV. The Federal Circuit's Decision Makes VA Contracting Less, Not More, Efficient for Veterans and the VA

Implicit in the Federal Circuit's ruling is the apprehension that giving the statute's terms their full effect would hamstring the VA and needlessly burden the contracting officer. *See* Pet. App. 19a-20a (describing as a "concession" Kingdomware's contention at oral argument that "under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even after it has met the goals set under § 8127(a)"). This apprehension is misplaced. The true cause for concern is the stifling of veterans' competitive bidding under the distorted system conceived by the Federal Circuit.

This was not The Case of the Speluncean Explorers. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). There was no need for the Federal Circuit to resort to drastic statutory maneuvers that would avoid the effects of the Act's express terms. The statute simply mandates the "Use of restricted competition," § 8127(d); it does not mandate the "Use of veteran-owned small businesses in all cases." Restricted competition—in the form of the application of the Rule of Two—is applied only when "the contracting officer has a reasonable expectation that two or more small business concerns

owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Absent that reasonable expectation as to the three essential components (two or more business concerns, fair and reasonable price, and best value to the United States), restricted competition is not even used (under the correct reading of the statute).

Fearing imaginary constraints on the VA contracting officers, the Federal Circuit created a flawed system to the detriment of SDVOSBs and VOSBs, and in defiance of the scope of the Act that Congress chose. *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

Respecting Congress's choice and upholding the statutory rights of veterans does not mean that VA purchasing will grind to a halt, burdened by needless competitive bidding. The VA is already subject to various other statutory obligations that influence its procurement decisions.[14] *E.g.*, Pet. App. 29a (Reyna, J., dissenting) (noting the VA's "*existing* obligations under the Federal Acquisition Regulation ('FAR') to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000" (emphasis in original)).

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[14] 48 C.F.R. § 819.7004 (SDVOSBs and VOSBs are followed in priority by small disadvantaged businesses, "Historically-Underutilized Business Zone" businesses, and businesses identified pursuant to any other small business contracting specification).

The Federal Circuit's weakening of veterans' protections in the 2006 Act does not promote a frictionless, free-market contracting system—just a distorted one that Congress never intended. *Id.* And aside from the fact that a court should not be guided in its interpretation of a federal statute by what result would be easiest for a contracting officer, the Federal Circuit's decision does not even achieve that outcome. The cumbersome, ad hoc process invented by the Federal Circuit makes the VA's job harder, not easier, and forsakes the 2006 Act's objectives.

By placing the word "shall" in "harmonious context," Pet. App. 20a, such that it means "may," the Federal Circuit turned the VA's contracting goals into ceilings. Indeed, under the Federal Circuit's distorted interpretation, the VA would be wrong to exceed its goals by awarding contracts to VOSBs and SDVOSBs in competitive bids once § 8127(d)'s goals had been reached. Pet. App. 29a-30a (Reyna, J., dissenting) (panel majority "finds mischief in requiring contracting officers to continue conducting Rule of Two analyses after the agency's goals are met"); *accord* Pet. App. 32a (Reyna, J., dissenting) ("The majority thus errs when it asserts that an obligatory Rule of Two requirement would obviate the goal-setting provision of the 2006 Veterans Act."). The Federal Circuit's refusal to believe that the mandatory mechanism could coexist with the VA's goals led the Federal Circuit astray.

A mandatory mechanism is no guarantee of meeting an aspirational goal. "[P]articipation goals are aspirations, not destinations." Pet. App. 30a (Reyna, J., dissenting). Parents who load their children into the car for a family vacation may set the car on

cruise control at 55 miles per hour, but that is no guarantee that the family will arrive at a desired time.

Attaining that goal depends on the availability of open lanes on the highway, the accessibility of gas stations along the way, the suitability of driving conditions, and a variety of other requirements. Just as the cruise control setting is no guarantee of timely arrival at the destination, so too is the mandatory Rule of Two mechanism no guarantee that the VA will hit its target. Section 8127(d)'s mandatory mechanism is fully consistent with the 2006 Act's aspirational goal. Indeed, it is the Federal Circuit that has reached a dissonant, and not harmonious, result by refashioning beyond recognition the core statutory mechanism for promoting competitive bidding by veteran-owned businesses.

* * *

Legislation like the 2006 Act cannot repay a Nation's debt; it is just a shadow of the country's gratitude. But the 2006 Act deserves to be interpreted as written.

The Federal Circuit's flawed interpretation affects millions of veterans, their businesses, and their employees across the Nation. The Federal Circuit's interpretation dramatically reduces the opportunities for veteran-owned businesses to do business with the department that Congress selected to uniquely assist veterans. The Court should reverse the decision below and restore the expectations of veteran-owned businesses and Congress.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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